

UNITED STATES PATENT AND TRADEMARK OFFICE

SERIAL NO: 76/666940

APPLICANT: Brooklyn Bottling of Milton, NY, Inc.

76666940

CORRESPONDENT ADDRESS:

JEFFREY E. JACOBSON
JACOBSON & COLFIN, P.C.
60 MADISON AVE STE 1026
NEW YORK, NY 10010-1666

RETURN ADDRESS:

Commissioner for Trademarks
P.O. Box 1451
Alexandria, VA 22313-1451

MARK: TROPICAL FANTASY TF EXTREME ENERGY DRINK

CORRESPONDENT'S REFERENCE/DOCKET NO: N/A

Please provide in all correspondence:

CORRESPONDENT EMAIL ADDRESS:

1. Filing date, serial number, mark and applicant's name.
2. Date of this Office Action.
3. Examining Attorney's name and Law Office number.
4. Your telephone number and e-mail address.

OFFICE ACTION

RESPONSE TIME LIMIT: TO AVOID ABANDONMENT, THE OFFICE MUST RECEIVE A PROPER RESPONSE TO THIS OFFICE ACTION WITHIN 6 MONTHS OF THE MAILING OR E-MAILING DATE.

MAILING/E-MAILING DATE INFORMATION: If the mailing or e-mailing date of this Office action does not appear above, this information can be obtained by visiting the USPTO website at <http://tarr.uspto.gov/>, inserting the application serial number, and viewing the prosecution history for the mailing date of the most recently issued Office communication.

Serial Number 76/666940

The assigned examining attorney has reviewed the referenced application and determined the following.

IDENTIFICATION OF GOODS

The identification of goods is unacceptable as indefinite. The underlined goods are acceptable as filed. The remaining goods require further amendment as noted.

Ecuabeverage Statement of Material Facts – Exhibit 18

The applicant may adopt the following identification, if accurate: “Energy drinks, soft drinks, fruit juice cocktails, fruit juices and bottled water,” in Class 32. TMEP §1402.01.

Please note that, while an application may be amended to clarify or limit the identification, additions to the identification are not permitted. 37 C.F.R. §2.71(a); TMEP §1402.06. Therefore, the applicant may not amend to include any goods that are not within the scope of goods set forth in the present identification.

STANDARD CHARACTER STATEMENT

Applicant must submit the following standard character claim: “The mark consists of standard characters without claim to any particular font, style, size, or color.” 37 C.F.R. §2.52(a); TMEP §807.03(a).

DISCLAIMER

The applicant must insert a disclaimer of TROPICAL and ENERGY DRINK in the application. Trademark Act Section 6, 15 U.S.C. §1056; TMEP §§1213 and 1213.08(a)(i).

A properly worded disclaimer should read as follows:

No claim is made to the exclusive right to use TROPICAL and ENERGY DRINK apart from the mark as shown.

TROPICAL is commonly used to describe beverage flavor. (See attached material from the Internet). Applicant identifies “energy drinks” in its identification of goods. Its specimen of record demonstrates that the mark is used on tropical flavored energy drinks. Therefore, the terms are descriptive and must be disclaimed.

Printouts of articles downloaded from the Internet are admissible as evidence of information available to the general public, and of the way in which a term is being used by the public. TMEP §710.01(b). *In re Total Quality Group Inc.*, 51 USPQ2d 1474, 1475-76 (TTAB 1999); *Raccioppi v. Apogee Inc.*, 47 USPQ2d 1368, 1370-1 (TTAB 1998).

The Office can require an applicant to disclaim an unregistrable part of a mark consisting of particular wording, symbols, numbers, design elements or combinations thereof. 15 U.S.C. §1056(a). Under Section 2(e) of the Trademark Act, the Office can refuse registration of an entire mark if the entire mark is merely descriptive, deceptively misdescriptive, or primarily geographically descriptive of the goods. 15 U.S.C. §1052(e). Thus, the Office may require an applicant to disclaim a portion of a mark that, when used in connection with the goods or services, is merely descriptive, deceptively misdescriptive, primarily geographically descriptive, or otherwise unregistrable (e.g., generic). TMEP §1213.03(a).

Failure to comply with a disclaimer requirement can result in a refusal to register the entire mark. TMEP §1213.01(b).

A “disclaimer” is a statement that applicant does not claim exclusive rights to an unregistrable component of a mark. A disclaimer does not affect the appearance of the applied-for mark.

The examining attorney has searched the Office records and has found no similar registered or pending mark which would bar registration under Trademark Act Section 2(d), 15 U.S.C. §1052(d). TMEP §704.02.

/Kathleen M. Vanston/

Examining Attorney

Law Office 103

(571) 272-9235

HOW TO RESPOND TO THIS OFFICE ACTION:

- **ONLINE RESPONSE:** You may respond using the Office's Trademark Electronic Application System (TEAS) Response to Office action form available on our website at <http://www.uspto.gov/teas/index.html>. If the Office action issued via e-mail, you must wait 72 hours after receipt of the Office action to respond via TEAS. **NOTE: Do not respond by e-mail. THE USPTO WILL NOT ACCEPT AN E-MAILED RESPONSE.**
- **REGULAR MAIL RESPONSE:** To respond by regular mail, your response should be sent to the mailing return address above, and include the serial number, law office number, and examining attorney's name. **NOTE: The filing date of the response will be the *date of receipt in the Office*, not the postmarked date.** To ensure your response is timely, use a certificate of mailing. 37 C.F.R. §2.197.

STATUS OF APPLICATION: To check the status of your application, visit the Office's Trademark Applications and Registrations Retrieval (TARR) system at <http://tarr.uspto.gov>.

VIEW APPLICATION DOCUMENTS ONLINE: Documents in the electronic file for pending applications can be viewed and downloaded online at <http://portal.uspto.gov/external/portal/tow>.

GENERAL TRADEMARK INFORMATION: For general information about trademarks, please visit the Office's website at <http://www.uspto.gov/main/trademarks.htm>

FOR INQUIRIES OR QUESTIONS ABOUT THIS OFFICE ACTION, PLEASE CONTACT THE ASSIGNED EXAMINING ATTORNEY SPECIFIED ABOVE.

<http://www.mammothfreeze.com/tropicalflavorbeveragemix.html>

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Model No.: FMBFW200421 - 689076200424

Product Origin: California - Texas

Brand Name: Five 02 - Fire Mountain Beverage Company

Payment Remarks: Based on Agreement Terms

Supply Ability: Based on Order Quantity

Minimum Order: Based on Delivery Agreement

Delivery Lead Time: Based on Delivery Location

Inner Packing: 24 = 1 Case, 72 Cases per Pallet

Certification(s): Premium Brand

Detailed Product Description

Flavored infused vitamin enriched with oxygen!

Oxygenated, vitamin-flavored tropical water: Is a great tasting, zero-sugar, zero

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Oxygenated, vitamin-flavored tropical water: is a great tasting, zero-sugar, zero carbohydrates, zero-caffeine, zero-calorie, non-carbonated, purified, flavored-water beverage infused with vitamins a, c, b-6, and b-12 coupled with niacin, potassium calcium and iron.

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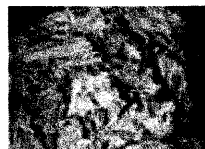
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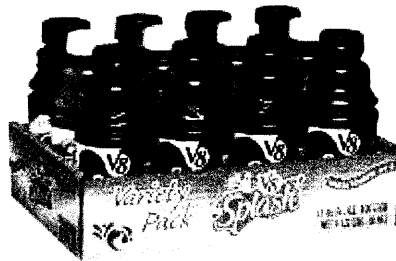
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